SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

In the Matter of the Application of

CITY OF AUBURN, TOWN OF OWASCO, OWASCO WATERSHED LAKE ASSOCIATION, INC.,

Petitioners-Plaintiffs,

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

-against-

JAMES V. MCDONALD, in his capacity as the Commissioner of the New York State Department of Health, NEW YORK STATE DEPARTMENT OF HEALTH, RICHARD A. BALL, in his capacity as the Commissioner of the New York State Department of Agriculture and Markets, and NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Respondents-Defendants.

Index No. _____

ORAL ARGUMENT REQUESTED

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

January 5, 2024

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PRELIMINARY STATEMENT

The Town of Owasco and the City of Auburn, two small upstate communities, face a public health crisis caused by harmful algal bloom ("HAB") contamination in Owasco Lake, a drinking water source for tens of thousands of residents. The Legislature has given New York State Department of Health ("DOH") broad authority to promulgate rules and regulations to protect drinking water sources such as Owasco Lake from contamination. DOH has long used this authority broadly to protect water supplies from many kinds of contamination, including nutrient pollution caused by agricultural runoff. Yet, after years of working with stakeholders in Cayuga County to draft updated watershed rules and regulations ("WRRs") to address the HAB crisis in Owasco Lake, DOH changed its position. DOH recently made the erroneous determination that it does not have legal authority to regulate agricultural nutrient pollution. This determination will harm the public health and the environmental rights of Cayuga County residents who are counting on DOH to perform its regulatory duties to reduce HAB contamination in Owasco Lake. Nutrient loading is a main driver of HAB outbreaks in Owasco Lake.

After floating several theories to support that determination, DOH recently landed on a conclusion that a 23-year-old Agriculture and Markets Law ("AML") that created a *voluntary* program through which farmers *may* address environmental concerns, robbed the Department of authority to protect drinking water sources from agricultural nutrient pollution. DOH made this determination even though that AML places no restrictions on the authority of other state agencies—something the Legislature has placed in other laws—and despite DOH's promulgation of WRRs regulating nutrient management in other state localities *after* the AML was enacted.

DOH's erroneous determination led the agency to not only decline to include new necessary nutrient management provisions in its proposed updated WRRs for Owasco Lake, but also to *weaken* the current regulations protecting the watershed from nutrient pollution. DOH also took these actions in a manner that violated its own procedures. DOH's erroneous legal determination, and its subsequent actions that flowed from the determination, have consigned Cayuga County residents to deal with a growing and likely to become unmanageable drinking water crisis in Owasco Lake. Because DOH's determination and related subsequent actions constitute an error of law, and are arbitrary, capricious, and harmful to Petitioners, this Court should annul the determination and enjoin DOH from taking further actions based on that determination.

FACTUAL BACKGROUND

Petitioners The Town of Owasco and the City of Auburn are the suppliers of water that draw and treat water from Owasco Lake and purvey it to thousands of residents throughout Cayuga County. In 2016, HABs engulfed Owasco Lake and produced detectable, unsafe levels of toxins in raw and treated water drawn from Owasco Lake. *See* Affidavit of Michael Youhana dated January 5, 2023 ("Youhana Aff."), Exhibit F.[1] Since then massive HABs have polluted Owasco Lake in each succeeding year up through the present. *See* Exhibit G. Although the City and Town have invested in filtration systems to purify drinking water drawn from the lake, local health officials are very concerned that these systems will not be able guard residents against such severe contamination indefinitely. The HAB outbreaks also have interfered with residents' recreational use of Owasco Lake. *See* Exhibits G, I, J.

[1] All exhibits referenced herein refer to the exhibits annexed to and verified in the Affirmation of Michael Youhana.

In response to this public health crisis, the City of Auburn and the Town of Owasco started a process in 2017 to draft new WRRs. *See* Verified Petition ¶ 64. Owasco Lake's WRRs had not been updated since 1985, and the City and Town came to understand that newer, science-based rules were necessary to tackle their watershed's growing HAB crisis. *Id.*

The procedure for developing and proposing WRRs requires the water suppliers to first draft proposed WRRs and the county health department to then transmit the draft to DOH. *See* Exhibit E ¶¶ 1–-6. The set of "Local Draft" rules transmitted to DOH here was developed over a number of years through an inclusive "public participation process" involving many stakeholders throughout Cayuga County. *See* Exhibits H, K. The public participation process was led by a Steering Committee upon which a representative of each petitioner, including the Owasco Watershed Lake Association ("OWLA"), sat. *See id*.

The Local Draft rules contained detailed agricultural nutrient pollution regulations because nutrient loading in Owasco Lake is a driver of HAB-contamination, and a majority of the lake's nutrient pollution is caused by agricultural activities. *See* Verified Petition ¶ 54; Exhibit M at 16–19, Exhibit A ¶ 4. DOH officials were made aware during the public participation process that the Local Draft would include binding agricultural nutrient management regulations but did not raise any legal concerns about including these provisions in WRRs. *See* Verified Petition ¶ 80.

In 2020, the City and Town made a formal request to DOH through the Cayuga County Health Department requesting DOH propose new WRRs adopting the language of the Local Draft to address the Owasco Lake HAB contamination crisis. *See* Exhibits E, P.

More than a year after that formal request, starting in 2022 and through much of 2023, the City and Town finally were able to discuss the substance of the Local Draft at length with

State officials, including the DOH officials responsible for reviewing the draft and possibly proposing revised WRRs. *See, e.g.,* Exhibits Q, V, AA. Approximately three years after receiving the formal request to propose new WRRs and a copy of the Local Draft, DOH issued a definitive legal determination that it lacks authority to promulgate WRRs touching upon agriculture, like those nutrient pollution regulations requested in the Local Draft. *See* Youhana Aff. ¶ 51; Exhibit AB.

Shortly thereafter, DOH informed the municipalities that it was denying their request to include the Local Draft's nutrient management provisions in proposed rules**.** *See* Exhibit AC. In addition, DOH decided to instead propose revised nutrient management provisions that are significantly less protective than even Owasco Lake's existing WRRs. *See* Exhibit AC, AD. The City of Auburn and the Town of Owasco objected to the proposed WRRs. *See, e.g.,* Exhibit I. DOH thereafter began preparing State Administrative Procedure Act documents so that it could propose those weaker WRRs. *See* Exhibit AE; Verified Petition ¶ 134. Petitioners were deeply dismayed by DOH's revisions and the steps it was taking to codify them, which made them feel as though years of time and effort invested into the WRRs development process had been wasted. See Exhibit A ¶¶ 7, 12; Exhibit B ¶¶ 7, 11.

STANDARD OF REVIEW

This Court reviews the decision of an administrative body under Article 78 of the CPLR to assess "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Under the "error of law" standard a petitioner typically argues that "the agency misinterpreted the applicable statute" *Jones v. Board. of Educ. of Watertown City Sch. Dist.*, 800 N.Y.S.2d 348 at *14 (Sup. Ct. 2005), *aff'd as modified*, 816 N.Y.S.2d 796 (2006). Courts give little deference

to an agency's interpretation when making an "error of law" assessment when "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" because "there is little basis to rely on any special competence or expertise of the administrative agency" in such circumstances. *Matter of Gruber*, 89 N.Y.2d 225, 225, 231 (1996) (citation omitted). There is also "no presumption in favor of [an agency's] construction of a statute [it] does not administer." *In re L.*, 342 N.Y.S.2d 231, 233 (Fam. Ct. 1973).

The "arbitrary and capricious" standard requires a different inquiry. To determine whether an agency acted in an arbitrary or capricious manner, a court must determine whether the action was "taken without sound basis in reason." *Matter of Newman v. City of Tonawanda*, 206 A.D.3d 1701, 1702 (4th Dept. 2022) (quoting *Matter of Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013)). As relevant here, "[a]n agency's failure to follow its own procedures or rules in rendering a decision is arbitrary and capricious*." Matter of Duverney v. City of New York*, 57 Misc. 3d 537, 542, (N.Y. Sup. Ct. 2017) (citation omitted).

ARGUMENT

I. DOH'S DETERMINATION THAT IT LACKS LEGAL AUTHORITY TO PROPOSE AGRICULTURAL NUTRIENT MANAGEMENT REGULATIONS FOR OWASCO LAKE AND ACTIONS THAT FLOWED FROM IT WERE AFFECTED BY ERRORS OF LAW AND ARBITRARY AND CAPRICIOUS.

DOH has issued an erroneous determination that the agency lacks authority under Public Health Law § 1100 to regulate farming practices that result in nutrient pollution in drinking water supplies. This determination is based on a misinterpretation of AML Article 11-a, as discussed in more detail below. As a result of this determination, DOH has taken two actions that are affected by an error of law and are arbitrary and capricious. First, DOH has denied a request by the City of Auburn and the Town of Owasco to include new nutrient management provisions designed to ameliorate the HAB crisis in Owasco Lake in proposed Watershed Rules and

Regulations. Second, DOH is stripping existing nutrient management provisions from the current Owasco Lake Watershed Rules and Regulations.

A. DOH Has the Authority and Duty To Regulate Nutrient Pollution Threatening the Safety of Drinking Water Supplies.

DOH has argued that it lacks statutory authority to promulgate regulations to protect drinking water sources from agricultural nutrient pollution, but a look at its enabling statutes reveals the opposite. New York's Public Health Law provides DOH with the power and duty to protect the state's water supplies. *See* N.Y. Pub. Health Law § 201(1)(l) ("The department shall, as provided by law… supervise and regulate the sanitary aspects of water supplies... and control the pollution of waters of the state"). The Legislature granted the Department authority to fulfil this duty, providing that DOH "may make rules and regulations for the protection from contamination of any or all public supplies of potable waters and water supplies of the state or United States, institutions, parks, reservations or posts and their sources within the state." N.Y. Pub. Health Law § 1100. DOH has construed the exercise of its Public Health Law § 1100 authority as a mandatory duty, stating that the agency "*shall* promote the protection of sources of public water systems through the adoption and enforcement of watershed rules and regulations." *See* Exhibit E ¶ A (emphasis added); *see also* N.Y. Pub. Health Law § 201(1)(l).

The statutes granting DOH its authority to protect waterbodies from contamination are unambiguous, and therefore must be interpreted to mean what they say. *See Matter of McCulloch v. New York State Ethics Comm'n*, 285 A.D.2d 236, 239 (3d Dept. 2001) (noting that when interpreting a statute, a court should "read the statute literally . . . and determine whether the language of the statute is unambiguous and clearly expresses the Legislature's intent"); *Matter of Dawn Joy Fashions, Inc. v. Comm'r of Lab. of State*, 90 N.Y.2d 102, 107 (1997) (interpretation of a law must be "anchored in the plain statutory language"). The law provides that the

Department may make rules for the protection of "*any or all*" water supplies throughout the state from "*contamination*." *See* N.Y. Pub. Health Law § 1100 (emphasis added). "Contamination" is a broad term that means "the process of making something dirty or poisonous, or the state of containing unwanted or dangerous substances." Contamination, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/contamination#google_vignette (last visited Jan. 4, 2024); *see also People v. Holz*, 35 N.Y.3d 55, 59 (2020) (citation omitted) ("[D]ictionary definitions serve as useful guideposts in determining the word's ordinary and commonly understood meaning."). Agricultural nutrients that make water unsafe to drink clearly fall within the scope of this definition. Unless qualified by some limiting term, like "non-agricultural," the word "contamination" should be construed as a "term[] of general import," and therefore "be given [its] full significance without limitation." *See Matter of Greenberg*, 70 N.Y.2d 573, 576 (1987); *see also City of New York v. Sands*, 11 N.E. 820, 823 (1887) ("whenever a power is given by a statute, everything to the making of it effectual is given by implication"); *City of New York v. North Queensview Homes, Inc.*, 282 N.Y.S.2d 850, 853 (Civ. Ct. 1967).

Indeed, it is apparent that DOH for many decades believed that it unambiguously had the authority to promulgate watershed rules to regulate agricultural nutrient pollution, because it has expansively used its Public Health Law § 1100 rulemaking authority, including to regulate nutrient pollution from agricultural and other activities. Even the current Watershed Rules and Regulations for Owasco Lake and its tributaries that DOH promulgated in 1985 contain several such provisions. For example, those rules prohibit persons from field-spreading manure within 75 feet of Owasco Lake unless the manure is plowed underground, and also prohibit the deposition of manure obtained from agricultural industries on the ground for fertilization within a 250-foot linear distance of the lake. *See* 10 NYCRR § 104.1(a), (b)(1)–(2), (d)(1), (d)(7).

Beyond this 250-foot setback, manure fertilizer can be deposited only if the persons can ensure that runoff from the manure does not enter the lake or watercourse. *See* 10 NYCRR § 104.1(b)(1)–(2), (d)(1). The 1985 rules also prohibit persons from storing potassium chloride fertilizer within 500 feet of the lake or watercourse, except in certain circumstances. 10 NYCRR § 104.1(b)(4), (d)(3).

The 1985 Owasco Lake Watershed Rules and Regulations are not the only Watershed Rules and Regulations DOH has promulgated to address agricultural nutrient pollution. The 2005 Syracuse Watershed Rules and Regulations contain a prohibition on the open storage of fertilizer "which is applied to the ground to increase nutrients to plants" near some parts of the Skaneateles Lake. 10 NYCRR § 131.1(b)(15), (f)(4)(i). The Syracuse rules also establish a program designed to eliminate or minimize sources of non-point source pollution that can become binding regulation on the use of manure and fertilizer. *See* 10 NYCRR § 131.1(b)(56), (f)(4)(ii). *See also* 10 NYCRR § 142.2(c)(6), (d)(4)–(5) (1992 Schenectady County Watershed Rules and Regulations restricting some uses of fertilizers that may threaten local aquifer and "open storage of agricultural chemicals" near certain waterbodies); 10 NYCRR § 112.5(e)(8) (1992 Village of Millbrook Watershed Rules and Regulations, prohibiting open storage of fertilizer in one watershed zone and mandating use of certain practices for fertilizer or manure land application).

B. DOH's Determination that AML Article 11-a Removes the Department's Longstanding Duty and Authority To Regulate Nutrient Pollution Is Based on an Error of Law.

DOH's determination that the Department "lacks delegated legislative authority to promulgate regulations" with farming requirements, including requirements to manage nutrients, was affected by an error of law. Exhibit AB; *see also Lewis Fam. Farm, Inc. v. Adirondack Park Agency*, 22 Misc. 3d 568, 578–79, 583 (Sup. Ct. 2008), *aff'd sub nom. Lewis Fam. Farm, Inc. v.*

New York State Adirondack Park Agency, 64 A.D.3d 1009 (3d Dept. 2009) (annulling an agency's determination based on a misinterpretation of its enabling statute that therefore "was affected by an error of law," and noting that "[n]o deference is accorded to an agency's determination where a court 'is faced with the interpretation of statutes and pure questions of law"). Specifically, DOH has misinterpreted AML Article 11-a, a law governing a different agency, in claiming that it precludes the exercise of DOH's regulatory authority. *See* Exhibit AB.

DOH's reading of AML Article 11-a is incorrect for several reasons. First, the statutory Article does not on its face preempt DOH from exercising its rulemaking authority. The Article's "plain statutory language" contains no provisions precluding DOH or any other state agency from adopting provisions affecting agricultural nutrient management. *See Matter of Dawn Joy Fashions, Inc.*, 90 N.Y.2d at 108 (interpretation of a law must be "anchored in the plain statutory language"). The Legislature easily could have included an express provision preempting state agency authority in the statute, much as it did for municipalities in AML § 151-d. *See People v. Page*, 35 N.Y.3d 199, 206–07 (2020) (citation omitted) ("where a law expressly describes a particular . . . thing . . . to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"). AML § 151-d (limiting authority of *local* governments to pass and administer "*local laws* or *ordinances*" that interfere with the AEM program and Article 11-a). AML § 151-d plainly does not apply to "*regulations* enacted pursuant to Public Health Law § 1100 [which] are enacted by the State Department of Health, not by political subdivisions of the state." *See* 1971 N.Y. Op. Att'y Gen. No. 170 (Nov. 17, 1971) (emphasis added) (finding that a statute preempting "regulation by any political subdivision of the state of sewage disposal from watercraft" did not strip DOH of any of its authority to regulate).

That AML Article 11-a does not place restrictions on DOH is buttressed by the Legislature's placement of such restrictions in other statutes. If the Legislature wanted to preclude DOH and other state agencies from exercising authority over agricultural nutrient pollution by passing Article 11-a, these lawmakers likely would have adopted language similar to that found in other New York statutes, which expressly limit the rulemaking authority of state agencies. *See Security Pac. Nat'l Tr. Co. v. Cuevas*, 176 Misc. 2d 846, 848–49 (Civ. Ct. 1998) ("we look to interpret the statute by looking at its terms, its history, and by comparison with other similar statutes"). For example, CLCPA § 8 expressly limits the power of "state agencies" to promulgate regulations in a manner that would limit the Department of Environmental Conservation's authority to regulate and control greenhouse gas emissions pursuant to article 75 of the Environmental Conservation Law. *See also* ECL § 15-2705 ("[T]he commissioner shall have exclusive jurisdiction over all other river areas in the state and of all parts of river areas owned by the state located within the Adirondack park which may become part of the system.").

Moreover, any argument that the Legislature implicitly repealed DOH's rulemaking authority when passing AML Article 11-a—the argument that DOH is essentially making—is belied by a basic canon of construction: "a statute generally repeals a prior statute by implication 'only if the two are in such conflict that it is impossible to give some effect to both.'" *Iazzetti v. City of New York*, 94 N.Y.2d 183, 189 (1999) (citation omitted) (noting that "[t]he Legislature 'is hardly reticent to repeal statutes when it means to do so'"). It is not impossible to give effect to both AML Article 11-a and Public Health Law § 1100. In fact, the two statutes operate harmoniously providing the state with different tools to apply to different circumstances. Article 11-a simply establishes a program to encourage farmers to adopt responsible environmental management practices, including practices designed to protect water. AML §§ 150, 151. Public

Health Law § 1100 provides DOH with a tool to *ensure* that polluters do not contaminate water supplies, based on the threat at hand. While voluntary entry into the AEM program may be sufficient to protect water in one part of the state, it may be insufficient in others. By keeping Public Health Law § 1100 on the books and unaltered after the passage of AML Article 11-a, it must be presumed that the Legislature allowed the state to continue to use binding nutrient management regulations when doing so is necessary to protect water from contamination. This presumption is more reasonable than DOH's conclusion that the Legislature silently stripped the Department of its longstanding duty and "exclusive authority" to promulgate WRRs for the protection of water. *See Matter of Saratoga Lake Prot. & Imp. Dist. v. Department of Pub. Works of City of Saratoga Springs*, 846 N.Y.S.2d 786, 793 (2007).

DOH's reading of AML Article 11-a is also unreasonable because it rests on the assumption that the Legislature chose to implicitly and cryptically cause great disruption to New York's system for regulating drinking water (and potentially great destruction to the environment). "[L]egislative bodies generally do not 'hide elephants in mouseholes.'" *Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (citation omitted). DOH's reading of the law leads inexorably to the deregulation and upending of decades-old nutrient management systems established throughout the state. Here, it simply beggars belief that in establishing the modest AML program, the State Legislature implicitly sought to strip away all of the nutrient management protections DOH promulgated and local communities across watersheds relied upon over many decades without making any mention of this tectonic decision in the statutory text. *See, e.g.,* 10 NYCRR §§ 104.1(d), 112.5(e)(8), 142.2(d).

Such a broad reading of AML Article 11-a—in addition to being implausible—also raises constitutional questions, and "courts must avoid, if possible, interpreting a presumptively valid

statute in a way that will needlessly render it unconstitutional." *See LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). As mentioned, if DOH's interpretation of AML Article 11-a were upheld, it would mean that Watershed Rules and Regulations presently protecting drinking water from nutrient pollution throughout the state would be invalidated. *See, e.g.,* 10 NYCRR §§ 104.1(d), 112.5(e)(8), 142.2(d). This invalidation of existing environmental protections would jeopardize residents' "right to clean . . . water, and a healthful environment." N.Y. Const. art. I, § 19; *see also Fresh Air for the Eastside, Inc. v. State*, WL 18141022 at *12 n.18 (Sup. Ct. 2022) (noting legal scholars' contention that with the passage of N.Y. Const. art. I, § 19, "[i]nterpretation of statutes and regulations will now apply these environmental norms") (quoting The Impact of the Green Amendment - *A New Era of Environmental Jurisprudence* by Prof. Nicholas A. Robinson. Elisabeth Haub School of Law at Pace University).

C. DOH's Determination that AML Article 11-a Removes the Department's Longstanding Duty and Authority to Regulate Nutrient Pollution Is Arbitrary and Capricious.

DOH's determination that AML Article 11-a stripped the Department of its longstanding authority to regulate farming was also arbitrary and capricious because it is inconsistent with the Department's past determinations about the scope of its rulemaking authority, and the Department failed to adequately explain this departure from precedent. *See Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520 (1985) ("[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so."); *Matter of Steinberg-Fisher v. N. Shore Towers Apartments, Inc.*, 149 A.D.3d 848, 850 (2d Dept. 2017) (supporting the proposition that decisions are arbitrary and capricious if they are made "without regard to the facts"). As set forth above, DOH has for decades issued and administered Watershed Rules and Regulations to prevent nutrient pollution associated with farming in waterbodies, which DOH has acknowledged it did in Syracuse. Exhibit AB. DOH's purported justification for the

inconsistency is that the Syracuse regulations were promulgated "before any of the agricultural planning provisions of AML Article 11-a existed." *Id*. But that is not true. The Syracuse Watershed Rules went into effect in 2005, whereas the AEM program was established by statute five years earlier in 2000. *See* 10 NYCRR § 131.1; *see also* AML § 151. Because DOH has failed to adequately explain its departure from precedent, its determination that it lacks legal authority to promulgate Public Health Law § 1100 regulations touching upon agricultural nutrient pollution is arbitrary and capricious.

D. DOH's Subsequent Actions Were Affected by an Error of Law and Arbitrary and Capricious.

Because DOH's erroneous and arbitrary and capricious determination about limitations on its rulemaking authority affected the Department's decisions to deny the City of Auburn and the Town of Owasco's request to propose more protective nutrient regulations and to weaken the lake's existing nutrient regulations, those subsequent decisions themselves are also affected by errors of law and are arbitrary and capricious. *See Lewis Fam. Farm, Inc.*, 22 Misc.3d at 578–83.; *see also Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d at 520; *Steinberg-Fisher,* 149 A.D.3d at 850.

II. DOH ACTED ARBITRARILY AND CAPRICIOUSLY BY FAILING TO FOLLOW ITS OWN RULEMAKING PROCEDURES.

DOH's decision to propose new Owasco Watershed Rules and Regulations in the State Register without agreement from the suppliers of water, along with actions it has taken to implement that decision, are arbitrary and capricious because they violate DOH's own procedures. *See McCollum v. City of New York*, 79 N.Y.S.3d 888, 890 (Sup. Ct. 2018), *aff'd*, 126 N.Y.S.3d 490 (2d Dept. 2020); *see also Hoosier Env't Council v. Nat. Prairie Indiana Farmland Holdings*, *LLC,* 564 F. Supp. 3d 683, 714 (N.D. Ind. 2021).

DOH has adopted a procedure setting forth several steps the Department must follow before publishing proposed Watershed Rules and Regulations "in the State Register in accordance with the State Administrative Procedures Act," Exhibit E ¶ 11. Under DOH's procedure, the water suppliers initiate the rulemaking process and draft rules in consultation with the county health department. *Id.* at ¶¶ 1–5. DOH then reviews the water suppliers' draft. *Id.* at ¶¶ 6–11. During this review, the Department may propose revisions to the draft before accepting the request to publish them in the State Register. *Id*. DOH, however, may publish the revised draft rules and regulations only if the water suppliers agree to the revisions. *Id.* at ¶¶ 6, 10, 11.

Here, the Department failed to abide by this procedure. In accordance with DOH procedure, the City and Town drafted and approved new Watershed Rules and Regulations for Owasco Lake in consultation with the Cayuga County Health Department and transmitted them to DOH (as noted earlier, the City and Town decided to draft the rules through an inclusive Public Participation Process). *See* Exhibits K, N, O. DOH reviewed the draft and made significant revisions to the Nutrient Management Section that not only deleted the Town and City's proposed provisions, but also weakened the current 1985 nutrient regulations for Owasco Lake. *See* Exhibit AA. The Town and the City strongly objected to these revisions. *See* Exhibits A, B, I.

DOH then decided to publish its revised draft in the State Register, notwithstanding the fact that the Department has failed to obtain the agreement of the water suppliers—the City of Auburn and the Town of Owasco—on revisions to the proposal. *See* Exhibit E ¶¶ 6, 10; *see also* Exhibit AC (noting that the Department "plans to keep the Nutrient Management provision in the proposed regulations as written and presented during the 7/31 meeting"); Exhibit A ¶¶ 6-12; Exhibit B ¶¶ 7-11; Exhibit I. Moreover, the Department has taken actions, including at least the

preparation of State Administrative Procedure Act documents, towards publication of the proposal opposed by the City and Town. Exhibit AE (noting that "DOH started the State Administration Procedure Act process" as well as the Department's intention to publish the proposal in the State Register in August 2024); *see also* Verified Petition ¶ 134. Thus, DOH has acted in a manner that is arbitrary and capricious and this Court should enjoin the agency from publishing without obtaining assent from the water suppliers.

III. DOH HAS VIOLATED THE ENVIRONMENTAL RIGHTS OF CAYUGA COUNTY RESIDENTS.

That DOH determined it cannot and will not regulate agricultural nutrient pollution in Owasco Lake without considering the environmental impacts of that determination violates the constitutional environmental rights owed to members of OWLA and the remaining Town of Owasco and the City of Auburn residents. N.Y. Const. art. I, § 19 ("[e]ach person shall have a right to clean . . . water, and a healthful environment"); *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 952 (Pa. 2013) (noting that Pennsylvania's analogous constitutional Environmental Rights Amendment requires "government to consider in advance . . . the environmental effect of any proposed action" on protected environmental rights).

The Environmental Right went into effect on January 1, 2022, before DOH determined that it cannot and will not regulate agricultural nutrient pollution in Owasco Lake. That determination is plainly germane to the new Amendment. The adoption of the Environmental Right was motivated, at least in part, to protect people and the environment from under-regulated, yet highly toxic contaminants, like HAB-derived toxins, in drinking water. The Statement of Justification for Assembly Bill A.1368 refers to "[r]ecent water contamination," which "highlighted the importance of clean drinking water . . . as well as the need for additional protections." Memorandum in Support of Legislation for 2021 Assembly Bill A.1368,

https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assemblyman-Englebright-Sponsor-Memo-for-A1368.pdf. The lead sponsor of the legislation, Steven Englebright, specifically mentioned locales where the state failed to prevent drinking water contamination in a 2018 floor debate when explaining why adopting the Environmental Right was necessary. Englebright, Assembly Floor debate on Assembly No. 6279, Rule Report 62, Apr. 24, 2017 at 30 (mentioning Hoosick Falls); *see also* Rebecca Bratspies and Katrina Fischer Kuh, *New Yorkers' Environmental Rights Are Under Attack* (June 24, 2022), https://news.bloomberglaw.com/environment-and-energy/new-yorkers-environmental-rights-are-under-attack.

Indeed, Finger Lakes advocates cited HAB contamination as a basis for supporting the adoption of the Environmental Rights Amendment and when interpreting state constitutional provisions, New York courts consider the views of voters. *See* Env't Advocates NY, *Advocates from the Finger Lakes Region Urge a YES Vote on Environmental Rights Amendment* (Oct. 12, 2021), https://eany.org/press_release/advocates-from-the-finger-lakes-region-urge-a-yes-vote-on-environmental-rights-amendment/ ("We're fighting against Harmful Algal Blooms . . . we have a historic opportunity to vote to protect our rights to a clean environment. Vote Yes on the Environmental Rights Amendment!"); Town of Ulysses, Resolution 2019-87 (Apr. 24, 2019), https://forthegenerations.org/wp-content/uploads/2020/06/SD-NY-20190424-NY-Green-Amendment-Resolution-Town-of-Ulysses.pdf (supporting the adoption of the Environmental Rights Amendment because Finger Lakes had "in recent years been affected by Harmful Algal Blooms making treatment more expensive for municipal water supplies, and sometimes impossible for individual households that draw water directly from the lake"); *Matter of Kuhn v. Curran*, 294 N.Y. 207, 217 (1945) (noting that courts "seek the meaning which the words would

convey to an intelligent, careful voter"); *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 509, 512–13 (2022) (citation omitted) ("[We] look for the intention of the People.").

DOH was required to consider the Environmental Right before determining it lacked authority to combat the HAB crisis in Owasco Lake, but did not. This Court should therefore annul the determination by DOH that it cannot and will not regulate agricultural nutrient pollution until the Department considers the expected impacts to water quality and on environmental rights resulting from that determination.

IV. PETITIONERS HAVE STANDING

Under New York's standing doctrine, petitioners challenging a state agency action are "obliged to show an actual stake in the controversy," but "[s]tanding rules are not to be applied in a manner so restrictive that agency actions are insulated from judicial review." *Matter of Town of Waterford v. New York State Dep't of Env't Conservation*, 134 N.Y.S.3d 545, 548, 549–50 (3d Dept. 2020) (internal quotations omitted) (finding that municipalities and residents had standing to sue DEC for State Environmental Quality Review Act findings and issuance of permits for landfill expansion). Here, Petitioners must demonstrate that DOH's actions have resulted in an injury-in-fact, and that the injury is within the "zone of interests" of the statute that the claim arises under. *Matter of Association for a Better Long Island, Inc. v. New York State Dep't of Env't Conservation*, 23 N.Y.3d 1, 6–7 (2014) (finding that town had a "concrete interest in the matter the agency is regulating, and a concrete injury from the agency's failure to follow procedure"); *see also Matter of Town of Babylon v. New York State Dep't of Transp.*, 33 A.D.3d 617, 618–19 (2d Dept. 2006).

The City of Auburn and the Town of Owasco have standing to bring this Article 78 proceeding. *See Matter of Vill. of Woodbury v. Seggos*, 154 A.D.3d 1256, 1259 (3d Dept. 2017) (holding that municipalities had standing to challenge a DEC approval to develop a well because

the action would "affect the use of ground water in that area for municipal water supplies or impact residents who may suffer impacts to their private wells as a result of the withdrawal"); *Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1541 (3d Dept. 2012). The City and Town suffered injuries-in-fact because of DOH's procedural violation, the Department's legal determination that it lacks authority to promulgate agricultural nutrient management rules, and the actions DOH took pursuant to that determination.

The City and Town have fact-based fear that DOH's determination and its subsequent related actions will allow the flow of nutrient pollution into Owasco Lake to continue and fail to abate the current contamination. Those effects will negatively impact the use of Owasco Lake for municipal water supplies and disturb the use of Owasco Lake by residents and businesses who rely on the lake for food, recreation, and revenue. *See* Exhibit A ¶¶ 7–11; Exhibit B. ¶¶ 9-11. These injuries plainly fall within the zone of interest of relevant provisions of the Public Health Law and the constitutional Environmental Right because those provisions were enacted to promote public health, prevent the contamination of water, and protect a healthful environment. *See* N.Y. Pub. Health Law §§ 201(1)(l), 1100; N.Y. Const. art. I, § 19; *see also Matter of Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9–12 (1975) (looking to Legislature's goals in enacting the statute to determine the "zone of interest").

OWLA also has standing to bring this Article 78 proceeding. To establish standing, an organization must show that: 1) "one or more of its members would have standing to sue;" 2) "the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests;" and 3) "neither the asserted claim nor the appropriate relief requires the participation of the individual members." *Matter of Finger Lakes Zero Waste Coal., Inc. v. Martens*, 95 A.D.3d 1420, 1421 (3d Dept. 2012) (citing *Society of*

Plastics Indus. v. Cnty of Suffolk, 77 N.Y.2d 761, 775 (1991)). In cases involving environmental harm, an organization can establish standing by alleging that the agency action will harm the organization's members in their use and enjoyment of natural resources, including by threatening their sources of drinking water. *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany,* 13 N.Y.3d 297, 304–305 (2009). While the harm alleged to individual members must be "different in kind or degree from the public at large . . . it need not be unique." *Matter of Sierra Club v. Village of Painted Post,* 26 N.Y.3d 301, 310, 311 (2015) (citation omitted) (finding standing even though Petitioner had not "suffer[ed] noise impacts different from his neighbors"); *Croton Watershed Clean Water Coal. Inc. v. Plan. Bd. of Town of Se., Covington Mgmt. Co.*, 798 N.Y.S.2d 708 (Sup. Ct. 2004).

OWLA meets this burden. First, one or more of OWLA's members has standing to sue, meaning she can "establish both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated." *See Matter of Vill. of Woodbury* 154 A.D.3d at 1258 (citation omitted). Julie Lockhart is a member of OWLA. Exhibit D ¶ 1. In her capacity as a member, Ms. Lockhart monitors HABs along the Owasco Lake shoreline on behalf of OWLA. *See id.* ¶ 8. Ms. Lockhart owns a home in the Town of Owasco near Owasco Lake, which is also the source of her drinking water. *See id.* ¶¶ 3, 5. Ms. Lockhart also uses Owasco Lake for recreation. *See id.* ¶ 5. Ms. Lockhart is injured by DOH's determination that it lacks legal authority to regulate agricultural nutrient pollution and the agency's subsequent related actions. *See id.* ¶¶ 6-12. DOH's actions not only raise the risk that Ms. Lockhart's drinking water supplies will be contaminated by toxins, but they also affect her recreational use of the watershed and will cause her to scale back activities such as kayaking. *Id.* Her injuries resulting from water contamination plainly fall within the zone of interest of the

provisions of the Public Health Law and the Environmental Right giving rise to this suit because these provisions were enacted to promote public health, prevent the contamination of water, and protect a healthful environment. *See* N.Y. Pub. Health Law §§ 201(1)(l), 1100; N.Y. Const. art. I, § 19.

Second, the interests asserted by OWLA in this lawsuit are germane to its organizational purposes. OWLA is a not-for-profit environmental organization whose mission is to preserve and protect the health of the Owasco Lake Watershed. *See* Exhibit C ¶¶ 2-3. OWLA dedicates many of its resources to managing the HAB crisis in Owasco Lake, including by monitoring the shoreline. *See id.* ¶¶ 6-8. OWLA is an especially apt representative of its members' interests in this lawsuit because the organization played an instrumental role in drafting the nutrient management regulations rejected by DOH. *See id.* ¶ 10.

Finally, this challenge to DOH's actions evidently does not require OWLA's individual members to participate because the proceeding involves questions of law and seeks generally applicable declaratory and injunctive relief. *See Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 395 F. Supp.3d 1, 18 (D.D.C. 2019) (citation omitted) ("Member participation is not required where a 'suit raises a pure question of law' and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization."). In sum, OWLA satisfies the three elements of organizational standing.

CONCLUSION

Based on the foregoing, this Court should: declare invalid the Department's determination that it lacks authority to promulgate regulations to protect drinking water supplies, including Owasco Lake, from nutrient pollution; and, declare that the Department's denial of the request to propose such regulations for Owasco Lake and removal of such existing provisions

from the watershed's existing regulations were improperly affected by that erroneous determination, improperly taken without agreement from the Town of Owasco and the City of Auburn, and are arbitrary and capricious and an abuse of discretion. This Court should also enjoin the Department from taking any additional actions that flow from those errors and improprieties.

Dated: January 5, 2024
New York, New York

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Memorandum of Law complies with the requirements of 22 NYCRR § 202.8-b. The document was prepared on a computer using Microsoft Word and is 6,351 words long (excluding the caption, table of contents, table of authorities, signature blocks, and this certificate), as computed by Microsoft Word.

Dated: January 5, 2024
New York, New York

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